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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TINA D. DUCKETT, Defendant and Appellant.	D052143 (Super. Ct. No. SCD205175)

APPEAL from a judgment of the Superior Court of San Diego County, Randa Trapp, Judge. Affirmed with directions.

Tina Duckett was charged with transportation of cocaine base (count 1) and possession of cocaine base for sale (count 2). (Health & Saf. Code, §§ 11352, subd. (a), 11351.5.) A jury convicted her of the count 1 transportation offense. For the count 2 possession for sale offense, the jury convicted her of the lesser included offense of possession. (Health & Saf. Code, § 11350.) Duckett contends that possession was also a lesser included offense of the *transportation* count, and accordingly (1) the trial court had

a sua sponte duty to instruct the jury that it could convict her of possession as a lesser offense of transportation, and (2) she could not properly be convicted of both transportation and possession.

We reject her arguments and affirm the judgment. We also order that the abstract of judgment be corrected to reflect that the sentence on count 2 possession is stayed, not concurrent.

FACTUAL AND PROCEDURAL BACKGROUND

On March 6, 2007, the police stopped a car in which Duckett was riding as a passenger in the rear seat. During a search of the vehicle, the police found a purse on the floor by Duckett's feet containing Duckett's driver's license, her Social Security card, and two plastic vials.[1] One vial contained four rocks of cocaine base, and the other vial contained seven rocks of cocaine base. A passenger seated next to Duckett had a "burnt glass pipe" used to smoke narcotics and a passenger in the front seat had an unused glass pipe.

For count 1, the jury convicted Duckett of transportation of cocaine base, with a finding that the transportation was not for personal use. For count 2, the jury convicted Duckett of possession of cocaine base as a lesser included offense of possession of cocaine base for sale. The trial court dismissed one of Duckett's two strike prior convictions and dismissed two of her three prior prison term enhancements, and sentenced her to seven years in prison (the lower term for count 1, doubled to six years

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1 The record reveals no dispute about the lawfulness of the search.

for one strike prior conviction plus one additional year for one prior prison term enhancement).

DISCUSSION

Overview

Duckett was charged with transportation (count 1) and possession for sale (count 2). The trial court instructed the jury that possession is a lesser included offense of possession for sale. The court did not instruct that possession is a lesser included offense of transportation, nor was such an instruction requested. Duckett asserts (1) the trial court had a sua sponte obligation to instruct that possession is a lesser included offense of transportation, and (2) she could not properly be convicted of both count 1 transportation and count 2 possession. We disagree.

Duckett's assertions concern two distinct issues: (1) the trial court's duty to instruct on lesser necessarily included offenses supported by the evidence, and (2) the multiple conviction bar applicable to lesser necessarily included offenses. This requires a determination of (1) whether possession was a lesser necessarily included offense of transportation, thus imposing a duty on the trial court to instruct the jury that it had the option of selecting the lesser offense for count 1, and (2) whether possession was a lesser necessarily included offense of transportation, thus precluding the count 2 possession conviction.

There are two tests potentially applicable to determine what constitutes a lesser necessarily included offense: the elements test (which examines the elements of the offenses) and the accusatory pleading test (which examines the language of the

accusatory pleading in addition to the elements). Although the instructional duty and the multiple conviction issues each require a determination of whether a lesser offense is necessarily included in a greater offense, as we shall explain, they concern different purposes and are not evaluated in precisely the same manner. Based on their distinctive purposes, the California Supreme Court recently held the instructional duty is governed by both the elements and the accusatory pleading tests, whereas the multiple conviction bar is governed solely by the elements test. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1229; accord *People v. Moon* (2005) 37 Cal.4th 1, 25-26.)

Applying these principles, we hold possession was not a lesser necessarily included offense of transportation under either the elements or accusatory pleading tests, and thus there was no error in the instructions and no bar to the multiple convictions. Alternatively, as to the instructional duty issue, we hold the trial court was not required to instruct that possession was a lesser included offense of transportation because there was no evidence that Duckett merely possessed, but did not transport, the cocaine base.

We also reject Duckett's reliance on dicta in *People v. Rogers* (1971) 5 Cal.3d 129, to support her argument that on the facts of this case possession is a lesser necessarily included offense of transportation. Under post-*Rogers* California Supreme Court authority, the *evidence* may not be considered to determine what constitutes a lesser necessarily included offense; rather, only the elements and the four corners of the accusatory pleading govern this issue. (*People v. Birks* (1998) 19 Cal.4th 108, 130-131; *People v. Ortega* (1998) 19 Cal.4th 686, 698, disapproved on other grounds in *People v. Reed, supra,* 38 Cal.4th at pp. 1228-1229.)

We shall first set forth the governing principles relevant to the instructional duty and multiple conviction issues, and then apply these principles to these two issues in the case before us.

I. *GOVERNING PRINCIPLES*

A. *Principles Governing Instructional Duty*

A trial court has a sua sponte duty to instruct on an uncharged lesser offense necessarily included in a charged offense if there is substantial evidence the defendant is guilty only of the lesser offense. (*People v. Birks*, *supra*, 19 Cal.4th at p. 118.) A lesser offense is necessarily included in a greater offense if the greater offense cannot be committed without also committing the lesser offense. (*Id*. at p. 117.) For purposes of the trial court's instructional duty on uncharged lesser offenses, a lesser necessarily included offense is defined under (1) the elements test, or (2) the accusatory pleading test. (*Ibid*.) These same two tests are also designed to protect the defendant's due process notice rights by ensuring that before a jury is instructed on a particular uncharged lesser offense the defendant has been given proper notice that he or she may be subject to conviction of that offense. (See *id*. at p. 118; *People v. Reed*, *supra*, 38 Cal.4th at p. 1227.)

Under the elements test, a lesser offense is necessarily included in a greater offense if all the legal elements of the lesser offense are included in the legal elements of the greater offense. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034; *People v. Moon, supra,* 37 Cal.4th at p. 25.) Under the accusatory pleading test, a lesser offense is necessarily included in a greater offense if the language of the accusatory pleading

describes the greater offense in such a way that all the elements of the lesser offense are included. (*People v. Montoya, supra*, 33 Cal.4th at p. 1035; *People v. Moon, supra*, 37 Cal.4th at pp. 25-26; *People v. Reed, supra*, 38 Cal.4th at pp. 1227-1228.)

The reason for requiring instruction on uncharged lesser necessarily included offenses is to ensure that the jury is given the choice to convict within the range of options selected by the prosecution in the accusatory pleading with notice to the defendant. As explained by the California Supreme Court, when the evidence warrants, instruction on uncharged necessarily included offenses "ensures that the jury will be exposed to the full range of verdict options which, by operation of law and with full notice to both parties, are presented *in the accusatory pleading itself* and are thus closely and openly connected to the case. In this context, the rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither 'harsher [n]or more lenient than the evidence merits.'" (*People v. Birks*, *supra*, 19 Cal.4th at p. 119.)

Given that the instructional duty is designed to provide the jury with the verdict options contemplated by the accusatory pleading, the definition of lesser necessarily included offenses for instructional purposes turns on the offenses set forth in the charging document. In addition to the expressly charged offenses, the offenses that are deemed to be set forth in the charging document consist of any lesser uncharged offenses that satisfy

either the elements test or the accusatory pleading test. (See *People v. Birks*, *supra*, 19 Cal.4th at p. 118; *People v. Reed, supra,* 38 Cal.4th at pp. 1227-1228.)

B. *Principles Governing the Multiple Conviction Bar*

In contrast to the instructional duty issue, which focuses on providing all the verdict options contemplated by the accusatory pleading, the rule precluding multiple convictions based on necessarily included offenses concerns whether a lesser offense is being imposed on a defendant in duplicative fashion via the greater and lesser offenses.

Generally, under Penal Code[2] section 954 a defendant may suffer multiple convictions for different offenses arising from the same act or course of conduct. (*People v. Reed, supra*, 38 Cal.4th at pp. 1226-1227.)[3] However, under a judicially created exception to this general rule permitting multiple convictions, a defendant may not receive multiple convictions based on necessarily included offenses. (*Id*. at p. 1227.) This exception is based on the rationale that if the greater offense cannot be committed without committing the lesser, conviction of the greater is *also* conviction of the lesser, and thus to permit conviction of both offenses in effect convicts the defendant twice of the lesser offense. (*People v. Medina* (2007) 41 Cal.4th 685, 702.)

In *Reed*, the California Supreme Court concluded that the determination of what constitutes a lesser necessarily included offense for purposes of the multiple conviction

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2 Statutory references are to the Penal Code unless otherwise specified.

3 In contrast, under section 654, multiple *punishment* may not be imposed for offenses arising from the same act or course of conduct. (*People v. Reed*, *supra*, 38 Cal.4th at pp. 1226-1227.)

bar should be based solely on the elements test, not on the accusatory pleading test. (*People v. Reed, supra,* 38 Cal.4th at p. 1229.) The *Reed* court reasoned that the accusatory pleading test is designed to address the issue of whether a defendant has received notice so as to permit conviction of *uncharged* lesser offenses, whereas there is no such notice issue when a court is determining whether a defendant may be convicted of multiple *charged* offenses. (*Id.* at pp. 1229-1230.) The court explained: "[W]e believe it is logically consistent to apply the accusatory pleading test when it is logical to do so (to ensure adequate notice) but not when it is illogical to do so (when doing so merely defeats the legislative policy [reflected in section 954] permitting multiple conviction. Our conclusion results in a straightforward overall rule: Courts should consider the statutory elements and accusatory pleading in deciding whether a defendant received notice, and therefore may be convicted, of an *uncharged* crime, but only the statutory elements in deciding whether a defendant may be convicted of multiple *charged* crimes." (*Id*. at p. 1231.)

Reed's directive to apply solely the elements test when evaluating the issue of multiple convictions is equally controlling in the situation where, as here, a defendant is convicted of an *uncharged* offense by virtue of its status as a lesser necessarily included offense of a *charged* offense. In this situation, as when the defendant is convicted of two charged offenses, the multiple conviction issue does not concern the issues of notice to the defendant or the provision of verdict options to the jury. Rather, when a defendant is convicted of a charged offense for one count and a lesser uncharged offense for another count, the sole concern relevant to the multiple conviction bar is whether the defendant

should not sustain multiple convictions because a conviction of the greater offense is necessarily a conviction of the lesser uncharged offense. If the defendant had been convicted of two charged offenses, under *Reed* solely the elements test would apply. There is no reason to deviate from *Reed*'s holding merely because the multiple convictions arise from a charged offense in one count and an uncharged lesser offense included *within a charged offense* in another count. Accordingly, the elements test is the sole relevant test even if the multiple convictions are based on charged offenses and uncharged lesser offenses.

C. *Evaluation of Evidence Not Proper to Determine Lesser Included Offenses*

In her briefing on appeal, Duckett relies in large part on dicta in *People v. Rogers, supra,* 5 Cal.3d 129 to support her contention that under the facts of this case, possession is a lesser necessarily included offense of transportation.

In *Rogers*, the court held that possession is not necessary to establish transportation. (*People v. Rogers, supra*, 5 Cal.3d at p. 134.)[4] After reaching this conclusion, the *Rogers* court posited: "In cases where defendant's possession is incidental to, and a necessary part of, the transportation charged, and no prior, different or subsequent possession is shown, the offense of possession is deemed to be necessarily included in the offense of transportation, and defendant may not be convicted of both charges." (*Id.* at p. 134, fn. 3.)

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4 We shall discuss *Rogers*' holding on this point in our discussion below when we apply the elements test to this case.

Relying on this dicta, Duckett argues that possession was a lesser necessarily included offense of transportation in her case because "there was no evidence [she] transported the cocaine base independent of possessing it." Even if this is true, the argument fails because the *Rogers* dicta is inconsistent with the California Supreme Court's more recent holdings in *People v. Birks, supra,* 19 Cal.4th 108 and *People v. Ortega, supra,* 19 Cal.4th 686, which indicate a trial court *may not consider evidentiary facts* when defining necessarily included offenses.

In *Birks*, the Supreme Court held the trial court had no duty to give a requested instruction on an uncharged lesser offense that was supported by the evidence (known as a lesser "related" offense), but which was not set forth in the charging document under the elements or accusatory pleading tests, even if the defendant waived his due process notice rights. (*People v. Birks, supra,* 19 Cal.4th. at pp. 112, 129-131.) The *Birks* court reasoned, inter alia, that if the duty to instruct on lesser offenses is determined by evidence at trial, this creates unpredictability and uncertainty at trial and appellate levels about what instructions are proper. (*Id*. at pp. 130-131.) Similarly, in *Ortega*, the court held that evidence adduced at trial should not be considered in determining whether a charged lesser offense is necessarily included in a charged greater offense so as to bar multiple convictions, reasoning that a rule precluding consideration of the evidence would promote predictability and consistency on the lesser included offense issue. (*People v. Ortega, supra,* 19 Cal.4th at p. 698; accord *People v. Montoya, supra*, 33 Cal.4th at p. 1036 [accusatory pleading test is confined to examination of pleading for greater offense]; *People v. Murphy* (2007) 154 Cal.App.4th 979, 983.)

To the extent the *Rogers* dicta directs trial courts to look at the evidentiary presentation to determine if the defendant possessed the drugs during the transportation and hence possession was a lesser necessarily included offense, this principle has been impliedly disapproved by *Birks* and *Ortega.* (See *People v. Thomas* (1991) 231 Cal.App.3d 299, 304-306 [rejecting *Rogers*'s suggestion to evaluate facts to determine multiple conviction bar]; *People v. Murphy, supra,* 154 Cal.App.4th at p. 984.)

II. *ANALYSIS*

A. *Duty to Instruct*

1. *Elements Test*

As stated, under the elements test, a lesser offense is necessarily included in a greater offense if all the legal elements of the lesser offense are included in the legal elements of the greater offense, so that the greater offense cannot be committed without necessarily committing the lesser offense. (*People v. Montoya, supra,* 33 Cal.4th at p. 1034; *People v. Moon, supra,* 37 Cal.4th at p. 25.) The elements of transportation are carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.) The elements of possession are actual possession or constructive possession (i.e., the right to dominion and control) of a usable quantity of a controlled substance with knowledge of its presence and illegal character. (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242; *People v. Rogers, supra,* 5 Cal.3d at p. 134; *People v. Valerio* (1970) 13 Cal.App.3d 912, 921.) In *People v. Rogers*, the California Supreme Court held that possession is not an essential element of transportation because a defendant may transport drugs that are in

the exclusive possession of another person. (*People v. Rogers, supra,* 5 Cal.3d at p. 134; accord *People v. Valerio, supra,* 13 Cal.App.3d at pp. 921-922; *People v. Thomas, supra,* 231 Cal.App.3d at p. 305; *People v. Eastman* (1993) 13 Cal.App.4th 668, 677.)[5] Based on the *Rogers* holding, in *People v. Thomas, supra*, 231 Cal.App.3d at page 305, the court concluded possession was not a lesser necessarily included offense of transportation under the elements test. (Accord *People v. Watterson* (1991) 234 Cal.App.3d 942, 947.)

To support her argument that possession is a necessary element of transportation, Duckett asserts that the conclusion in *Rogers* on this point was incorrect. She recognizes, however, that we are bound to follow the *Rogers* holding (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and raises the argument to preserve her rights to further review. Although a court in another jurisdiction has disagreed with *Rogers'*s conclusion and held that possession is a necessarily included offense of transportation (*State v. Chabolla-Hinojosa* (Ariz.App. 1998) 965 P.2d 94, 99 [knowing transportation of drugs may not be committed without some form of dominion and control over the drugs]), we are bound to follow California Supreme Court authority.

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5 The issue in *Rogers* was whether a defendant (who was driving a vehicle with a passenger who possessed marijuana) could be convicted of transportation of marijuana even though the jury had acquitted him of possession of marijuana. (*People v. Rogers, supra,* 5 Cal.3d at pp. 131-132.) *Rogers* answered this question affirmatively, reasoning that conviction of the transportation offense did not necessarily require that the defendant have possession of the drugs. (*Id.* at p. 134.) In a footnote, the *Rogers* court also recognized that inconsistent verdicts are permissible. (*Id*. at p. 134, fn. 4; see *People v. Palmer* (2001) 24 Cal.4th 856, 860-861.)

Based on the *Rogers* holding that transportation may be committed without possession, we conclude possession is not a lesser necessarily included offense of transportation under the elements test. (*People v. Thomas, supra*, 231 Cal.App.3d at p. 305; *People v. Watterson, supra,* 234 Cal.App.3d at p. 947.)

2. *Accusatory Pleading Test*

Under the accusatory pleading test, the language of the accusatory pleading is examined to determine if it describes the greater offense in such a way that all the elements of the lesser offense are included. (*People v. Montoya, supra*, 33 Cal.4th at p. 1035; *People v. Moon, supra*, 37 Cal.4th at pp. 25-26; *People v. Reed, supra*, 38 Cal.4th at pp. 1227-1228.) Here, the count 1 transportation charge states that on or about March 6, 2007, Duckett "did unlawfully transport and offer to transport" cocaine base. This pleading contains no factual allegation that Duckett had the right to dominion and control over the cocaine base during the transportation. Thus, not all the elements of possession are included in the transportation charge as pleaded.

Count 1 also contains a sentencing allegation that the transportation was not for personal use within the meaning of section 1210, subdivision (a). Sentencing allegations are not considered under the accusatory pleading test to identify lesser included offenses. (*People v. Wolcott* (1983) 34 Cal.3d 92, 96, 100-101; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1398.) In reaching this conclusion, the *Wolcott* court reasoned that a defendant may not be on notice of an uncharged lesser included offense created from a sentence enhancement allegation, and further noted that allowing sentencing enhancement allegations to frame uncharged lesser included offenses would create

confusion and place pragmatic burdens on the trial court. (*People v. Wolcott*, *supra*, 34 Cal.3d at p. 101 & fn. 2; see also *People v. Sloan* (2007) 42 Cal.4th 110, 114 [court should not consider sentencing enhancement allegations for multiple conviction bar].)

Moreover, even if the sentencing allegation here was considered, it does not include a possession allegation. Section 1210 concerns the requirement that defendants convicted of a nonviolent drug possession offense receive probation conditioned on completion of a drug treatment program. (§ 1210.1.) A "nonviolent drug possession offense" is statutorily defined as including both possession for personal use *and transportation* for personal use. (§ 1210, subd. (a).) Thus, the term "nonviolent drug possession" does not necessarily require possession, because it also includes persons who transport for personal use drugs that are in the exclusive possession of another. Here, because the sentencing allegation solely states *transportation* not for personal use, with no reference to *possession* not for personal use, it does not include a factual allegation of possession.

Finally, the fact that possession is an element of *count 2* possession for sale does not show the prosecution has included possession as a factual allegation for *count 1* transportation. The accusatory pleading test evaluates whether a particular uncharged lesser offense is included within a charged greater offense based on the language of the pleading *for the greater offense*. As stated in *People v. Moon*, *supra*, 37 Cal.4th 1, "Under the accusatory pleading test . . . we look not to official definitions, but to whether the accusatory pleading describes *the greater offense* in language such that the offender, if guilty, must necessarily have also committed the lesser crime." (*Id.* at pp. 25-26, italics

added.) Thus, the charged greater offense is reviewed *on its own* when a trial court is determining if there are any factual allegations in the pleading creating an uncharged necessarily included offense for that particular count. (See, e.g., *People v. Thomas, supra,* 231 Cal.App.3d at p. 305; *People v. Montoya, supra,* 33 Cal.4th at pp. 1035-1036; *People v. Rundle* (2008) 43 Cal.4th 76, 142-144; *People v. Lewis* (2004) 120 Cal.App.4th 882, 885, 887-888.) That is, the trial court looks only to the language pleaded with respect to the charged greater offense itself to determine what, if any, lesser offenses are necessarily included within that charged offense under the accusatory pleading test.

Because there are no factual allegations of possession in the transportation count, we conclude possession was not a lesser necessarily included offense of transportation under the accusatory pleading test. (*People v. Thomas, supra,* 231 Cal.App.3d at p. 305.)

3. *No Substantial Evidence of Possession Without Transportation*

Independent of our holdings under the elements and accusatory pleading tests, the trial court was not required to instruct that possession was a lesser included offense of the transportation count because there was no substantial evidence that Duckett merely possessed, but did not transport, the cocaine base. As stated, the duty to instruct on lesser necessarily included offenses arises only if there is substantial evidence that the defendant is guilty only of the lesser offense. Substantial evidence in this context is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Imposition of culpability for transportation is based on a legislative determination that the potential for harm is greater when narcotics are transported from place to place, rather than merely held at one location. (*People v. LaCross* (2001) 91 Cal.App.4th 182, 186.) The term "transportation" has no technical meaning; it does not require that a particular distance be traversed; and it is not limited to any particular means of movement. (*Id*. at pp. 185-186.) Rather, transportation is established based merely on a showing that the defendant moved the controlled substance from one place to another. (*Id*. at p. 185.)

The evidence here showed that the police stopped a vehicle, Duckett was riding in the vehicle, and Duckett had cocaine in her purse while she was in the vehicle. There were no facts refuting the showing that Duckett carried the cocaine base from one place to another. This establishes transportation, not mere possession. There was no evidence from which the jury could find Duckett committed the offense of possession but not the offense of transportation. Absent this evidentiary basis, the trial court did not have a duty to instruct that possession was a lesser included offense of the transportation count.

B. *Multiple Convictions of Transportation and Possession*

Again asserting that possession is a lesser necessarily included offense of transportation, Duckett contends that it was improper for her to be convicted of both count 1 transportation and count 2 possession.

Our analysis above relevant to the instructional duty issue resolves this contention. As stated, solely the elements test applies to the multiple conviction issue. (*People v. Reed, supra*, 38 Cal.4th at p. 1229.) Under the elements test, possession is not a lesser

necessarily included offense of transportation. Alternatively, even assuming arguendo the accusatory pleading test applies to determine whether the multiple conviction bar should be applied in this case, the pleading does not set forth the right to dominion and control element in the count 1 transportation charge. Further, as with the instructional duty issue, the California Supreme Court has concluded it is not proper to undertake an evaluation of the evidence to determine lesser included offenses for purposes of the multiple conviction bar. (*People v. Ortega, supra,* 19 Cal.4th at p. 698; see *People v. Montoya, supra,* 33 Cal.4th at p. 1036.)

Duckett was properly convicted of both transportation and possession. (*People v. Thomas, supra,* 231 Cal.App.3d at p. 306.)

III. *SENTENCE FOR COUNT 2*

When two criminal convictions arise from the same act or course of conduct, sentence on one of the convictions must be stayed. (§ 654; *People v. Deloza* (1998) 18 Cal.4th 585, 592 [section 654 requires stayed, not concurrent, sentence].) At sentencing, the trial court stated that it was staying sentence on the possession count under section 654. Thereafter, the trial court referred to the sentence as "concurrent" and the clerk's minutes refer to the sentence as concurrent. Apparently because of this ambiguity, the abstract of judgment identifies the count 2 possession sentence as concurrent.

In supplemental briefing, the parties agree that sentence on count 2 should be stayed, as initially stated by the trial court. Accordingly, we order that the abstract of judgment be corrected to reflect a stayed sentence on count 2.

DISPOSITION

The judgment is affirmed as to guilt. The trial court shall prepare an amended abstract of judgment reflecting the stayed sentence on count 2 possession, and shall forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.